Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of The Telecommunications Act of 1996	)	MB Docket 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket 01-317
	)	
Definition of Radio Markets	)	MM Docket 00-244
	)	
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	)	MB Docket 03-130

PETITION FOR RECONSIDERATION

Robert W. McChesney and Josh Silver of Free Press, pursuant to 47 USC §405(a) and 47 CFR §1.429, respectfully petitions for reconsideration of the Report and Order and Notice of Proposed Rulemaking, FCC 03-127 (released July 2, 2003) ("R&O").

Free Press is a national non-profit media reform organization working to open and democratize media policy debates in America. The FCC's recent R&O changing the rules governing broadcast ownership, cross-ownership of broadcast stations and newspapers, and the definition of radio markets is of paramount importance to our organization. Free Press would be harmed if reconsideration is not granted because the democratic media system we endeavor to cultivate would be seriously weakened. Our current media system is the result of explicit government policies that are drafted without the informed consent of public citizens and using a

conception of First Amendment protections that favors private property over public interest. Since vibrant, diverse and independent media are the cornerstone of a functional democracy, the policy trend advanced by the R&O represents perhaps the most critical issue of our day. The task of bathing media policy in democratic participation and rooting our understanding of First Amendment protections in a proper understanding of the Founders' intentions and the history of journalism would be badly undercut if these rule changes are implemented.

The Founder and Director of Free Press filed Comments in the proceedings below. See Comments of Josh Silver, dated January 18, 2003 ("Josh Silver Comments", MM Docket No. 02-277); Comments of Robert W. McChesney, dated April 9, 2003 ("Robert W. McChesney Notice", MM Docket No. 02-277)

Reconsideration should be granted for the following reasons:

1) In the analysis and ruling on the cross-ownership regulations, we believe that fundamental attributes of public First Amendment rights were not sufficiently considered, if indeed they were brought to the attention of the Commission at all.
2) The absence from the ruling of these essential ideas concerning the constitutional rights provided by the free press contributes to a general misunderstanding of the historical development of commercial journalism in the United States and its relationship to citizenship and public service.
3) An accurate account of the composition of the First Amendment in the early Republic and its implications for the history of journalism point to radically different conclusions with regard to the standards and thresholds of public service, diversity, localism, and competition than those held by the Commission.

4) These conclusions would require a thoroughgoing reevaluation of the analytical, constitutional, economic and legal premises upon which the ruling is based. In short, the mechanism of market-based regulation in the media system is a poor solution for the protection of First Amendment rights. Survival of the fittest in oligopoly markets is hardly a recipe for providing a free, fair, and comprehensive public debate. Protecting the free speech of the few does not provide it for the many—on the contrary, it impedes it. Markets logically produce winners and losers and function most efficiently when inequality between players is wide. Democracy functions best when all speakers have the opportunity to be heard and inequality in debate is narrow. An analysis of public rights to a free press as conceived by the Founding Fathers and the first generations of American government bears out this argument. The history of journalism further reinforces the point by persuasively demonstrating that regulation through the marketplace is a relatively new phenomenon in American journalism that has been disputed from its inception as neither free nor commensurate with First Amendment ideals.

In an effort to specify our concerns as much as possible to the text of the R&O, we shall respond to instances in the ruling that we believe require reconsideration in light of a more comprehensive review of historical and theoretical analyses. Listed below are three statements from the R&O which we feel capture the concepts we wish to address. In particular, we would like to draw attention to concepts supporting the Commission's understanding of the marketplace of ideas, the market as the arbiter of public political communication, the First Amendment, and the relationship of these ideas to the history of commercial journalism.

¶ 352 "Indeed, the very notion of a marketplace of ideas presupposes that some ideas will attract a following and achieve wide currency, while others quietly recede having failed to conquer the

hearts and minds of the citizenry. Our Constitution forbids government action to pre-select the winners in this competition or to guarantee the circulation of any particular set of ideas."

¶ 353 "Nor is it troubling that media properties may allow their news and editorial decisions to be driven by "the bottom line." Again, the need and desire to produce revenue, to control costs, to survive and thrive in the marketplace is a time honored tradition in the American media. Indeed, it was not until newspaper publishers learned to market their papers as tools of commerce that the press became a force in the public debate that lead to the framing of our Constitution."

¶ 354 "In short, to assert that cross-owned properties will be engaged in profit maximizing behavior or that they will provide an outlet for viewpoints reflective of their owner's interests is merely to state truisms, neither of which warrants government intrusion into precious territory bounded off by the First Amendment. To the contrary, we are engaged in this exercise precisely because we seek to encourage the airing of diverse and antagonistic viewpoints. It would be odd indeed if our rules were structured to inhibit the expression of viewpoints or to promote only an accepted set of ideas."

These statements all appear in the order in the section concerning cross-media ownership. We feel that this is the most important rule at issue, and so we have chosen to focus our discussion here. Further, within these statements are clearly displayed the positions and assumptions guiding the Commission with regard to the First Amendment, the nature and history of commercial journalism, and the marketplace of ideas. From ¶352, it appears to us that the Commission interprets the First Amendment as primarily, if not exclusively a negative right—i.e. the government will protect free speech from being abridged but it has no responsibility to promote it. From ¶353, it appears to us that the Commission understands the First Amendment to have been conceived and shaped in an explicit environment of commercial media operating in a self-defined marketplace of ideas. Moreover, the implication is that the Founders understood the media system in this way, a smaller and yet formally similar version of the system we currently have. It is this ongoing system of commercial journalism that the Commission refers to as the "time honored tradition" of the American media marketplace. Finally, from ¶354, we understand the Commission to be arguing that the market is the primary, exclusive, and best mechanism to govern the output of the public media system. By promoting

efficiency in the marketplace, the Commission appears to believe that it is promoting the degree of diversity, localism, and competition demanded by the public through their patterns of consumption. By removing regulation and allowing the fittest to survive in the market, the Commission states that it has most firmly guaranteed that the government plays no role in either inhibiting or promoting any particular viewpoint.

In the following petition for reconsideration, we will argue that these understandings of the marketplace of ideas, the First Amendment, the circumstances of the Founders, and the history of journalism are seriously flawed. We will present evidence that the market is an improper mechanism for managing the public media system. We will argue that the commercial media system is not a time honored tradition of American journalism dating from the 18th century, but rather a more recent development of industrial capitalism. Further, we will demonstrate that the Founders certainly did not understand commercial journalism in the way that we do now. Finally, we will couch all of these arguments in a discussion of the First Amendment which asserts an alternative understanding of its principles which we believe are a more appropriate reading of the legacy of the Bill of Rights.

The starting point for developing an intelligent response to this deregulatory process is the analysis and deconstruction of the prevailing ideas about the relationship between the *press*, its *public*, and their common *government* [Here we should understand *press* to refer to the media system as a whole]. The pillars around which these relationships are built are the First Amendment and the marketplace of ideas. Essentially, the conventional position on the relationship between the press, the public, and the government mirrors the model of laissez-faire economics. The press is seen as a marketplace of information providers dependent upon consumer interest to survive and flourish. The public is seen as a group of political consumers

each in search of the best presentation and interpretation of facts and ideas to assist in his or her political decision making on public affairs, i.e. how they should vote every two to four years (or increasingly, whether they should bother), and which social and political institutions warrant support and which antipathy. The press provides the raw materials for debate, the public battles it out in a "marketplace of ideas" by selecting and advocating particular positions. The result is the truth, or what the majority of the public has ordained as the people's opinion of the truth. This informed consensus then forms the foundation of representative democracy, the sentiment that elects politicians and guides the formulation of public policy between elections.

Conventional wisdom provides that the system is a well-oiled machine with only minor wrinkles in the works which are to be ironed out by federal agencies like the FCC. The public is served by an large array of media channels, all of which are dependent for market success on their degree of relevance to public interest. The best any good regulator can do is stay out of the way and let the competition of ideas provide for a free and fair public debate and ultimately a truthful representation of public opinion. Any government intervention merely amounts to a politically motivated intent to suppress and influence developments in the public sphere. Elementary economics dictates that a marketplace works best when it is unfettered, guided only by the invisible hand of efficiency and the survival of the fittest. The government's role, in this view, is to stay out of the conditions of production in the press industry and see to it that the health of the marketplace is nurtured and perpetuated. Any degradation of public service is due to market inefficiency and can be corrected through economic measures.

In this view, regulation of the media markets should therefore more appropriately be called facilitation, and the FCC is the primary facilitator accountable to the public. In this model of market primacy in the regulatory scheme, citizens are treated as consumers. The primary

concern is what an individual may buy in the media marketplace, not what public services are offered by the media system to the citizenry. When consumer and civic behavior are blended into a single set of marketplace transactions between political ideas (where public interest is determined competitively rather than deliberatively), the FCC has made a very specific move in conceiving the nature of the relationship between press, public, and government.

Beneath this portrait of the current administration of the media marketplace and the government's regulatory apparatus lies the Constitution and its First Amendment. Every understanding of the interrelationship between press/public/government assumes an interpretation of the freedom of speech and the press. These liberties have historically proven hard to define. The intentions of the Founders, the interpretations of this nation's great statesmen in the succeeding generations, Supreme Courts over the years, and the modern administrations in Washington have often taken significantly different approaches to First Amendment privileges. The understanding of how free speech and free press should be deployed in society has always been influenced by the current assumptions of contemporary policy makers about history, legal theory, and democracy's relationship with media. Despite these historical vagaries, the core values of press and speech freedom are woven into the fabric of the American political system.

It is critical to point out that this fabric changes texture in different historical circumstances. Consequently, it is necessary to adopt at least a loose conceptual model to analyze the varied sources of First Amendment beliefs at any given moment in time. To that end, we submit that our conceptions of the press system draw primarily on historical traditions, although legal theory, the case law precedents of our highest courts, and popular sentiment (i.e.

the character of common sense prevailing in any given political environment) also play important roles.

The model of the press regulator as marketplace facilitator is rooted in the libertarian tradition of American political history that (arguably) dates back to the original drafting of the Bill of Rights. More recently, it rests on a solid base of case law that has consistently focused on First Amendment rights as negative freedom, i.e. the freedom *from* interference, which applies primarily to the individual. It is a legal philosophy of the mold shaped by John Milton, John Locke, and John Stuart Mill. The central premise is that the absolute protection of every individual's political speech will naturally provide for a free and full public debate—as no one with a mind to speak will be prevented from doing so and the rational merits of each individual statement will determine its fate. Conventionally, the portrait of constitutional thinking about the First Amendment ends there, although there is much more to consider, as we will presently demonstrate. The libertarian tradition is only one half of the Founders' legacy. For now, it is sufficient to attend to the key points in a narrow interpretation. This libertarian conception of free speech for the individual has fed and been fed by the popular conflation of market capitalism and American democracy as interlocking (if not interchangeable) ideals. Competition in the marketplace, the freedom of entrepreneurs to test their fortune, the de facto impropriety of government interference, and blind faith in the natural forces of an unencumbered market system to yield only the best outcomes—these are values that have come to stand astride Adam Smith's economic legacy as well as Thomas Jefferson's political tradition of free speech.

However, we make a grave mistake when we unreflectively assume a fit between 18th century political thinking and 21st century media economics. The highly concentrated, oligopoly markets for the mass mediation of modern political communication has been conceptually

squashed into a town-meeting hall in colonial Massachusetts. This is a gross misrepresentation of Jefferson's political thinking, the historical development of free speech rights, and the structure of the modern political economy. The Founders could not have conceived the media in the form it currently holds, and they would almost certainly have framed the debate over the free press in different ways had they the slightest notion of what was to come. Nonetheless, the historical resonance of the "marketplace of ideas" as a political philosophy associated with the Founding Fathers and the judicial edicts of the First Amendment titans of the libertarian bench—most notably Justices Holmes and Black—has caused these ideas to seep into the political culture as dogmatic constitutional interpretations. Moreover, the contemporary political rhetoric merging market capitalism and democratic government have merged with this tradition to produce a powerful bloc of blind support for libertarian speech and press rights. Despite the depth of entrenched fortification beneath these doctrines, they are badly flawed. We have essentially applied a political philosophy of the free press designed to accommodate one historical period and its media economics and applied it into a totally different future context without considering the ways in which the Founders conceptions should be considered in light of these changed circumstances. We have put new wine in old bottles without properly understanding why or what the consequences might be. In this uncritical ideological zone, the idea of the government as the market facilitator makes perfect sense.

This picture of contemporary American political culture and its bearing on the relationship between the commercial press, the FCC, and the polity is not new. Nor is the critique of it which we are about to offer. Nor are the counter-arguments which we will also provide. The pool of literature on the First Amendment and the politics of press regulation is one of the deepest and broadest in all of academia. It deals with concerns shared by media scholars,

lawyers, historians, sociologists, and political scientists alike. Every ten years or so, seminal works of communications studies are produced which viciously critique the status quo, present dire warnings about a future world without immediate change, and conclude with the outlines of new policy directions for the construction of an alternative relationship between press, public, and government—i.e. an alternative configuration of interpretations for history, law, and political culture. With each passing decade the crisis described has escalated as predicted. The tale has been written by analysts hailing from a surprisingly broad field of ideological loyalties. This critical perspective and its clear-headed statements have mirrored the development of the commercial press system over the years, modifying the critique to account for worsening conditions. Each of these oppositional briefs point to crack in the First Amendment foundations of the market-based media system.

What do we mean by First Amendment rights? Virtually everyone in this extremely de-politicized society could probably give a fair answer to this question—which does not mean that it is universally understood, of course, but only that it is universally recognized. Some might even be able to recite from the Bill of Rights the oft quoted phrase, "Congress shall make no law…abridging the freedom of speech, or of the press." The key analytical problem here is to identify the central purpose of the Amendment. What rights and liberties follow from forbidding Congress to interfere with speech? What are the conditions sufficient to provide free speech and which are merely necessary?

Our belief is that the conventional wisdom about the First Amendment mistakes a necessary condition for a sufficient one in the guarantee of free speech rights, and in so doing elides the very foundation of its intention and importance. More specifically, negative freedom (the absolute protection of individual speakers from interference) has pushed out positive

freedom (the provision of a public sphere in which the public has a right to hear all speakers) as the central right protected by the law. Put another way, the right of an individual to speak with impunity has taken priority over the right of the community to hear all speakers in a protected arena. It is necessary for all individuals to have the right to speak freely, but that is not sufficient to guarantee that the public may hear all voices. A prohibition on interference does not account for the social, economic, and political conditions in society which structurally impede certain voices while amplifying others. Whereas an active responsibility to provide for free speech would demand that public power remove these obstructing conditions whenever possible. *Freedom from* has distracted us from *freedom for*.

Among the most damaging results of this misunderstanding have been further misconceptions embedded in the primary one. For example, the protection from public censorship (government power), a necessary condition for complete negative freedom but not a sufficient one (as there are substantial forms of private power which have the power to censor), has also been mistaken for a sufficient condition for complete negative freedom. And worst of all, the positive freedom which guarantees to promote and sustain the structure of public hearings has been dismissed as neither a necessary nor a sufficient condition, but rather an automatic result of negative freedom. In its most widely understood form, then, the First Amendment means merely the protection of individual speech from government interference. This is the kernel of popular understanding of what is otherwise known as the "libertarian tradition" of First Amendment thought. In this understanding, private institutions may lawfully disrupt the public's ability to hear the full spectrum of social speakers by self-interestedly gate-keeping the primary forums for public speech.

Let us begin with the explanation of how we came to make these mistakes. Their roots lie in a very particular reading of American history which we see very clearly in the statements and assumptions in the R&O. In this reading, the Founding Fathers inaugurated the great experiment in self-government by breaking with the traditions of English common law which protected speakers and printers from prior restraint, but prosecuted them subsequently if their utterances were found objectionable. American law would protect all speech from prior restraint and from subsequent prosecution, the idea being that the benefits of completely free speech would outweigh the damages of the occasional libel and pernicious falsehood. These libertarian gentlemen, led by no less than Thomas Jefferson, recognized that a free society depended upon free, fair, and open discussion in the public sphere in order to formulate a well deliberated public opinion to guide representatives in the government. A law which expressly prohibited Congressional interference with public speech guaranteed a free and responsible polity would not be manipulated by minority power but would be motivated only by civic virtue.

In 1798, only a handful of years after the ratification, the Bill of Rights received its first test. The administration of John Adams, anticipating a possible war with France, passed the Alien and Sedition Act, outlawing seditious libel in the press. Two dozen printers were brought up on charges. Jefferson's Republicans rebelled against this abridgement of free speech, denounced it as unconstitutional despotism and eventually won its repeal. Thenceforth history reports that Americans had learned the value of free speech, become imbued with the libertarian spirit of self-government, and cultivated a democracy around free, fair, and full public discussion. This self-conception was further entrenched by the passage of the 14th Amendment after the Civil War and became the foundation of 20th century legal thinking on free speech issues.

The 20th century saw numerous challenges to this doctrine. Through two world wars and two red scares, Americans saw other Americans brought to trial for public speaking. Conditions were grudgingly applied to the absolute protection of speech, such as "clear and present danger," which permitted some suppression in certain cases. It was even accepted by some that the Founders did not really mean to protect slander against individuals, obscenity or other matters which might deserve civil litigation. But these were the exceptions which proved the rule of the libertarian tradition. Free speech and a free press, negatively protected by constitutional right from the abuses of public power, provide for a full and open public debate, the foundation of democratic self-government, full stop, end of story. Bend it might, but the stranglehold on the public imagination held by the image of free speech as exclusively the prohibition of government interference has never been broken. It is a source of great national pride and a symbol of the American democratic spirit.

However, recent historical inquiry has shown the 18th century roots of the libertarian tradition to be questionable if not unsound. There is evidence to suggest that the libertarian tradition was not particularly prevalent among the Founders. Moreover there is evidence to suggest that they understood and valued positive freedom with an equal, if not greater passion than negative freedom. The unearthing of an alternative tradition of First Amendment thinking among the Founders has begun to topple the theoretical scaffolding holding up much of more contemporary libertarian legal and social thinking on the issue. The alternative tradition allows for a profoundly different understanding of the First Amendment with impressive implications.

To begin with, it seems clear to any honest historian that no one knows exactly what the Founders had in mind when they drafted the First Amendment. Like much of the Constitution, the Framers were blessed, in Leonard Levy's apt phrase, with a "genius for studied

imprecision."[1] In other words, there is good reason to believe they did not precisely commit to one interpretation or another because they expected subsequent generations to require room for maneuver. The documented context of its writing and original passage is murky and leaves few clues. Leonard Levy caustically describes the debate in the Congress: "Apathy, ambiguity, and brevity characterize the comments of the few Congressmen who spoke on the First Amendment. The House did not likely understand the debate, care deeply about its outcome, or share a common understanding of the finished agreement."[2] Levy concludes that given the absence of any clear statements or arguments in the debates surrounding the Bill of Rights (either at the state or the federal level) as to what the freedom of expression actually meant to the people and the legislators, (aside from ambiguous support for the principle), we must assume that they endorsed the traditional views on the subject. These traditions were not at all libertarian. English common law routinely prosecuted speakers for objectionable material, and it was generally understood that free speech was explicitly limited in many cases.

Granted, there is considerable disagreement with the negative thesis of Leonard Levy.[3] For our purposes, however, the degree of original credibility held by the libertarian tradition is not the most important point. The evidence suggests that even in the best case scenario for the ardent libertarian traditionalist, the Founders were ambivalent about the meaning of free expression. It is not at all clear what they thought, and it seems most likely that they were not all that sure themselves. In such a case, it would seem critical for historians to explore the record to search for alternative or complementary understandings of the First Amendment to broaden our perception of original intent as well as historical legacy.

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[1] Leonard W. Levy. *Emergence of a Free Press*. New York: Oxford University Press, 1985, 348.
[2] Levy, 267.
[3] See for example, Jeffery A. Smith. *Printers and Press Freedom*. New York: Oxford University Press, 1988.

In his recent study of the period, legal scholar Akhil Reed Amar argues that "[t]he essence of the Bill of Rights was more structural than not, and more majoritarian than counter."[4] Or in other words, the first ten amendments to the Constitution were less about protecting minority rights—less a foundation for a libertarian tradition—than they were a positive plan for promoting majoritarian rights. He argues that even though the Bill of Rights has traditionally been read as a list of inalienable rights guarding minorities from the tyranny of the majority, its original intent was quite different. He makes a powerful case that structural concerns, i.e. those dealing with the sanctity of the public's collective right to self-government, were foremost in the minds of the Founders, not the inalienable rights of individuals. The great concern was protecting the public and the means of self-government from they tyranny of ruling elites. This majority protection, he argues, was the driving principle behind the Bill of Rights in its original historical setting.

With regard to the First Amendment, this means that the freedom of expression should be broadly conceived as the protection of the public's right to hear all points of view in a free, fair, and full sphere of deliberation. It is only secondarily an edict protecting the speech of all individual speakers. Minority rights to expression are thus a function of the majoritarian principle. By prohibiting the power of government from interfering with public speech in general, the structural integrity of the public sphere would be preserved. This is not to say that the Founders would have countenanced private power (economic, political or religious) disrupting the public sphere. Quite simply, in the late 18th century the only power strong enough to curb the freedom of expression in the public sphere was the government. If a law was created to forbid that interference, the possibility of minority power corrupting self-government would

[4] Akhil Reed Amar, *The Bill of Rights*. New Haven: Yale University Press, 1998, xiii.

be thwarted.[5] The Founders saw the dire necessity of keeping the public informed, engaged, and active in political society. Jefferson's warning of the consequences of a de-politicized public resonates with the primary threat of elite usurpation of power: "If once they [the people] become inattentive to the public affairs," he wrote his friend Edward Carrington, "you and I, and Congress and Assemblies, Judges and Governors, shall all become wolves."[6]

If the First Amendment is seen as a law protecting majoritarian rights to self-government through free expression, the idea that it is limited to the prohibition of government interference with individual speech seems inadequate. For example, if the integrity of the public sphere were to be threatened by a private power, the First Amendment would have jurisdiction. Or if the public sphere could be promoted, maintained, or empowered through government action, this also would fall under First Amendment principles. The law forbids the government from abridging free expression, but it says nothing about a prohibition on government *promotion* of free expression. Moreover, a majoritarian interpretation implies that it is not only *not* forbidden, but that it is positively obliged.[7]

We can see these understandings in action in the postal policy of the new federal government which reflected the Founders commitment to the right of the citizenry to as a wide a circulation of public information as possible. Richard John, in his excellent history of the postal system, describes what he calls the "educational rationale for postal policy" adopted into the Post Office Act of 1792. Essentially, it was the intent of the Framers to create a postal system that best facilitated the distribution of public information to the citizens active in the self-governing

[5] Amar, 18-21. Amar argues that it was the 14th Amendment which turned the tide of First Amendment thinking into a libertarian camp. This is a persuasive claim, but it does not change the original intent of majoritarian rights nor the validity of the theoretical tradition which hails from it.
[6] Adrienne Koch and William Peden, ed. *The Life and Selected Writings of Thomas Jefferson*. New York: Modern Library, 1944, 412. Quote taken from a letter to Edward Carrington, January 16, 1787.
[7] Amar, 41. Amar also suggests that Article IV of the Constitution supports this position.

of the society. Were it not for considerations of local markets and delivery guarantees, newspapers would likely have been distributed for free as a matter of principle. Lawmakers certainly considered it before opting to grant newspapers full access to the postal system with extremely favorable rates. These low rates ensured the feasibility of wide distribution and resulted in a huge expansion of the press system. The policy acted as a public subsidy for the promotion and circulation of public information for the purposes of cultivating the values of self-government.[8]

At a relatively low-orbiting theoretical level, the Postal Act represented a government regulation designed to promote majoritarian rights to free speech by expanding and enriching the public sphere. Similarly the Founders supported public libraries and educational institutions. The public right to have access to, and the capacity to know, the truth were a critical part of the Enlightenment understanding of the public sphere.[9] The government could certainly sponsor a free press, i.e. make laws to positively enhance it, even as, conversely, it could not negatively curtail it.

The expansion of the press system after the Revolution elevated newspapers into "the matrix of the function of popular government and the protection of civil liberties."[10] That is, public opinion embraced the free circulation of public information and the freedom of expression as an important part of governmental society. Newspapers were evolving into the 4th Estate, "an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power fragmented,

[8] Richard R. John. *Spreading the News*. Cambridge: Harvard University Press, 1995, 30-37.
[9] Smith, 44-46.
[10] Levy, 273. See also Barnhurst and Nerone. *The Form of News*. New York: Guilford Press, 2001, 43-5.

manageable, and accountable."[11] The importance of public engagement and participation in the ongoing debates in the press was not only a central legal right but a functional, practicable goal. The number of papers in proportion to the number of eligible voters (defined rather strictly in those days) was impressive, and access for speakers and readers alike was not a problem. Jefferson eloquently summarizes the principles at stake: "The basis of our governments being the opinion of people," he wrote, "the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter. But I should mean that every man should receive those papers, and be capable of reading them."[12] This is an oft-quoted passage, but its final sentence, occasionally omitted, warrants special attention here. The implication is that it is not enough to negatively protect the press system. It must be actively promoted to ensure universal distribution of all public information to competent citizens. In other words, the public's right to hear all voices and properly digest their messages is the central platform of a democracy.

In the history of the First Amendment, then, the key question is not where and when strict libertarian concepts of free expression were adopted nor where the boundaries of the public sphere or the 4th Estate were drawn. The important conclusion is that this arena of public discourse was of central importance to the Framers of a democratic experiment. The structural integrity of the press system, the institutions of town hall meetings and public assemblies, and the ability of anyone with an opinion to set up a soap box on a street corner were all generally recognized as the true meaning behind the freedom of expression. The important thing for them was not the specifics of protecting each individual speaker, but rather ensuring that the system as

[11] Levy, 273. See also John Nerone. *The Culture of the Press in the Early Republic*. New York: Garland Publishing, 1989, 19.

a whole remained operational and effective. This analytical move squares Levy's argument that the Framers did not intend libertarian absolute freedom of expression with the contention that the structural issues are more important than the individual ones. The libertarian tradition is historically subordinate to the majoritarian.

Given this alternative picture of historical events which qualifies and revises traditional accounts of First Amendment origins, it follows that the development of legal and theoretical ideas about the freedom of expression should also reflect a different logic. The theoretical postulate which we may take from the identification of majoritarian rights as primary to individual rights can be directly mapped onto the idea that positive freedom or affirmative freedom assumes and precedes negative freedom or prohibitive freedom. That is to say, the protection and sustenance of the majority's right to a free, fair and full public sphere is not guaranteed simply by prohibiting government from interfering with individual speech. Venerated First Amendment scholar Zechariah Chafee explained the point: "To us this policy is too exclusively negative. For example, what is the use of telling an unpopular speaker that he will incur no criminal penalties by his proposed address, so long as every hall owner in the city declines to rent him space for his meeting and there are no vacant lots available?" Chafee argues that the public must make available to all willing speakers the means to speak their mind, "for otherwise the subjects that most need to be discussed will be the very subjects that will be ruled out as unsuitable for discussion…We must do more than remove the discouragements to open discussion. We must exert ourselves to supply active encouragements."[13]

In a more recent treatment of this negative/positive freedom debate, Owen Fiss distinguished two primary treatments of the First Amendment, the "autonomy principle" and the

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[12] Koch and Peden, ed., 411-12. Quote taken from a letter to Edward Carrington, January 16, 1787.
[13] Zechariah Chafee. *Free Speech in the United States*. Cambridge: Harvard University Press, 1941, 559.

"public debate principle." The "autonomy principle" is the libertarian tradition which holds that individual speech rights, properly protected, will automatically yield a full and free public debate if left unencumbered. The "public debate principle" is the majoritarian tradition which denies that autonomy is fully instrumental in providing for the public's rights and authorizes an active state to cultivate and promote the structural conditions of an "uninhibited, robust, and wide-open" public debate, to quote from Justice Brennan's ruling in *New York Times Co. v. Sullivan* (1964).[14]

The positive freedom which obliges the state to make laws that aid rather than abridge free expression denies the adequacy of purely negative rights. Moreover, it recognizes the corollary responsibilities of the state that are not questioned as "infringements" on First Amendment freedoms though they unquestionably aid in its promotion. Alexander Meiklejohn's position on this distinction is worth quoting at length:

> "First, let it be noted that, by those words [the text of the First Amendment], Congress is not debarred from all action upon freedom of speech. Legislation which abridges that freedom is forbidden, but not legislation to enlarge and enrich it. The freedom of mind which befits that members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the unhindered flow of accurate information, by giving men health and vigor and security, by bring them together in activities of communication and mutual understanding. And the federal legislature is not forbidden to engage in that positive enterprise of cultivating the general intelligence upon which the success of self-government so obviously depends. On the contrary, in that positive field the Congress of the United States has a heavy and basic responsibility to promote the freedom of speech."[15]

In this interpretation, flouting the legitimacy of affirmative government action in the realm of public speech on the grounds that it violates the speech rights of individuals misunderstands the priority of majority over minority rights and the structural basis of the First Amendment.

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[14] Owen M. Fiss. "Why the State?" *Harvard Law Review* 100, no. 4 (1987): 785.

Paul Stern defines the Meiklejohnian "political interpretation of speech" further, writing "that our protection of free speech is grounded in its function of sustaining a framework of unconstrained public discourse in which agents can deliberately define their purposes by reciprocally weighing the merits of opposing positions."[16] The "framework" must retain its structural integrity, must adhere to the "public debate principle" of Owen Fiss, because it is the foundation of deliberative self-government. Without it, democracy falls apart, and public power devolves to private speakers whose liberties are permitted to corrupt the majoritarian right to a free and full public sphere.

The distinction between public and private speech and the rights and liberties which accrue to each are central to Meiklejohnian theory. Each citizen has two "radically different" sets of interests and loyalties. One is to the society, to the pursuit of the common good of all the people, the premise on which the social contract is built. The other is to himself and his private interests, the pursuit of the greatest advantage to his personal beliefs and property. In the first instance we are the governors, the makers of laws and the planners of a better society for all. In the second instance we are the governed, the individuals subject to the laws holding relative autonomy within them.[17] To the extent to which private speech (or more to the point, private control of the systems of communication) does not serve or contradicts a public function, it is not protected by the First Amendment, and in some cases must be actively resisted to preserve the forms of speech which are constitutionally mandated. *This resistance does not come in the form of suppressing speech, but rather in the form of empowering more speech to match the advantage gained by a disproportionately amplified private speaker in the public sphere.*

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[15] Meiklejohn, *Political Freedom*, 19-20.
[16] Paul G. Stern. "A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse." *Yale Law Journal* 99, no. 4 (1990): 925.
[17] Meiklejohn, *Political Freedom*, 80.

The right of the public to an open and free public arena is inalienable. The right to speak within that arena in the interest of the public good from any particular perspective is inalienable. The right to engage in that arena with the intent of securing private gain, and in particular if that intent and action subverts the general integrity of an open and accessible public sphere, is not inalienable. It violates the higher law of public speech rights. This kind of private speech cannot be instrumentally abridged, but it can be structurally countered to shore up the integrity of the media system by empowering disadvantaged voices.

This is an absolutely central point with regard to the modern press. Gone are the days when the town meeting and the community forum could stand for the public debate. The mass media is the general arena of deliberation. The press, once conceived as a part of the public sphere and a player in the public debate, has become the mediator of that debate as well as its primary player. When that mediator and its necessarily greater power, volume and control begins to advocate from a position of private interest, the principles of the First Amendment's structural protections, its majoritarian rights, collapse.[18]

Moving out into the realm of the political culture, if the intent of a journalist is not primarily to serve the public, but rather to sell papers, increase ratings, scoop rivals, or deliver up content which draws the audiences most desirable for sale to advertisers—or more controversially, if the intent is to push a particular political position or omit a particularly political position—the majoritarian principles of the First Amendment are undermined. According to this theory, if speakers (whether they are individuals or media channels) use their public speaking opportunities for commercial gain rather than public service in ways that

[18] It is important to note that Meiklejohn is using this argument to define and defend public speech, rather than define and decry private speech masquerading as public speech. He is arguing against the validity of the "clear and present danger" ruling which he believes infringes on the absolute right of the public to voice its political opinions.

succeed in reducing opportunities for other speakers, they are fundamentally undercutting First Amendment rights of their fellow citizens and obliging the government to take an active role in remedying the imbalance in the structure of the public sphere. Moreover, by protecting such private speech under the banner of public speech, we may succeed in subverting the very purpose of the latter. "The right of citizens of the United States to know what they are voting about, by an unholy union with a private desire for private satisfaction, is robbed of its virtue."[19]

We are not arguing that the government should take an overly intrusive hand in the editorial rooms of commercial media, but rather that the commercial media system itself is at odds with the principles of the First Amendment. Either the government must take a hand in expanding speech to include that which is excluded by the private masters of the public debate, or it must take control of the structural administration of the public sphere in which the commercial interests may be permitted to act as one set of players. More to the point, we can no longer be satisfied with a definition of the First Amendment that rests exclusively with the forms of negative freedom universally applied. "Misguided by that formalism we Americans have given to the doctrine merely its negative meaning. We have used it for the protection of private, possessive interests with which it has no concern. It is misinterpretations such as this which, in our use of the radio, the moving picture, the newspaper and other forms of publication, are giving the name 'freedoms' to the most flagrant enslavements of our minds and wills."[20]

Arguing that the press has turned away from its public mission does not mean that it should be muzzled or censored. It means that the media must bear the burden of regulation due a system of public debate institutionalized into a commercial system for private gain. The public

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But the principles he lays out to make his case can easily be applied to other challenges, not least of which is the most relevant political problems of today.

[19] Meiklejohn, *Political Freedom*, 55.

[20] Meiklejohn, *Political Freedom*, 87-88.

rights stripped out by market forces must be reinstated by public policy. The spirit of the First Amendment would indicate that the solution lies in re-publicizing the public sphere. Private control of the system and its major voices can only be countered by the public protection of the system through the advocacy and subsidy of more speech, specifically from those speakers who are not permitted or able to gain access to the current media.

Congress and the FCC have the responsibility to positively protect the right to public speech by ensuring a free, full, fair, and deliberative space for public debate. William Hocking described his proposals to "provide presumptive but not prescriptive routes" to a satisfactory public sphere as "means to freedom" not obstructions to it.[21] Therefore, they must open up the press—by which we may broadly include print, broadcast, and electronic media—to ensure that every relevant opinion may be heard. That this cannot easily be done in a commercial system does not make it less necessary. It demands that the principles of self-government and public needs be placed ahead of the pursuit of private gain and its institutions. As famously put by the Hutchins Commission in 1947 whose report reads just as relevantly today as it did half a century ago: "Freedom of the press means freedom from and freedom for…The freedom of the press can remain a right of those who publish only if it incorporates into itself the right of the citizen and the public interest."[22]

Perhaps no other concept has more influenced the debate over the relationship between individual and majoritarian rights as the so-called "marketplace of ideas." In this model of the public arena, all speakers are totally uninhibited by the government and left to the devices and merits of their own ideas in the marketplace. Citizens (or media providers) compete for credibility and audiences in the marketplace, and through a Darwinist process of natural

[21] William Ernest Hocking. *Freedom of the Press*. Chicago: University of Chicago Press, 1947, 96.
[22] Robert M. Hutchins. *A Free and Responsible Press*. Chicago: University of Chicago Press, 1947, 18.

selection, the best ideas win out and go on to shape public policy. The marketplace of ideas is meant to operate just as a marketplace for goods and services does—a pure meritocracy with the best of all possible results ensured through the invisible hand of free and fair competition.

Given the importance of the structure of the media system to the guarantee of the First Amendment outlined above, we might do well to wonder where the structure *is* in the marketplace of ideas. On first blush, it appears to be a free-for-all without much in the way of conditions, rules of operation, or methods of competition. A rather near-sighted answer to this question is that the invisible hand functions as the structural operator and we need not concern ourselves any further. A more charitable answer might point to the standard regulatory regime of all markets which the government maintains to ensure free and fair competition between all entrants. In this understanding, it is the government's economic responsibility to the public, not its constitutional commitments, which encourages the state to monitor rules and check abuses. Generally speaking however, the marketplace of ideas is a laissez-faire system. All individuals within it have free reign to do as they will with minimal government involvement. Private power trumps public power as a rule of thumb.

There are major problems with mapping an exchange model of marketplace competition onto the public sphere of political communication. Stepping back a moment into history, we may recall that the Founders had another structural model in mind around the time of constitutional ratification: the public sphere. It sounds a lot like the marketplace of ideas, but there are key differences. To get at these differences, we must understand early American thinking on organized power and free expression. For starters, we have what we might call the precedent of the Alien and Sedition Act of 1798. In structural terms, the debate over sedition dealt with the power of the government to intervene in the public sphere. In the libertarian

tradition of First Amendment thought, the prohibition of organized public power from activity in the arena of public speech is the foundation of the right. Perhaps because of this beginning, this tradition has rarely considered other forms of organized power which might threaten the public's right to free expression, such as privately organized power. It seems a logical move to make, but it has not often been made in mainstream legal theory. Yet we should take note that the Founders argued against public power not to explicitly exempt private power, but because no privately organized power then existed that had the capacity to topple free and full public debate. If the government could be prevented from interfering, the public sphere would be open. Of course, in modern times, this is no longer the case. There are many seats of privately organized power with the ability to topple free expression. But the theory of the structure of public speech has not taken this fully into account. In large part, this is because the marketplace of ideas has replaced the public sphere as the ideal type of structure at the center of theory on the First Amendment. The public sphere demands protection from all organized power, internal and external. No minority interests may control the system of communication and no voice within the public sphere should have greater weight than another. In the marketplace of ideas, it is only the external intervention of public power which is prohibited. No restrictions are placed on internal power. Hence the private censor may replace the public censor without breaking the rules.

This strikes us as a bitter irony. Essentially, the zeal of the First Amendment defenders of the private right to uninhibited speech has led directly to the ability of minority speakers to monopolize the marketplace of ideas, box out unwanted speakers in the most mainstream channels to which everyone has access, and defend their actions as inalienable constitutional rights. It is the direct result of the conflation of individual, negative speech rights with the

marketplace model to the exclusion of public, affirmative speech rights and the ideal of the public sphere. In today's media marketplace, dominated by a handful of mega-corporations, a group of organized private interests can gatekeep the marketplace, determine the parameters of public debate, and marginalize unprofitable or politically undesirable speakers by denying them access to the high-impact, mainstream media. The marketplace has no rules and no theoretical problems with a homogenous bloc of political communication in the center of public communication, banishing the bulk of diversity to low traffic media like small circulation print publications and little known websites. When we grant absolute freedom to private media operators to do as they choose with their channels, we give them the constitutional right to ignore their constitutional duty—to give all public ideas a public hearing. Why should we fear public tyranny and embrace its private form? Owen Fiss laments precisely: "Autonomy provides the proponents of deregulation with a constitutional platform that is ill-deserved."[23]

There have been occasional legal attempts to recognize and rectify this state of affairs. For example, in *Associated Press v. United States* (1945), the Supreme Court ruled that AP could not withhold news from public media channels who wished to take advantage of the wire service. Justice Black writing for the Court ruled: "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[24] Justice Frankfurter in his filing affirmed this sentiment: "A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public ownership."[25] This is a clear vindication of public over private rights to freedom of expression, affirmative structural rights trumping negative individual rights. By implication, any

[23] Fiss, 790. Perhaps the best statement of this irony is in Jerome A. Barron. "Access to the Press--a New First Amendment Right." *Harvard Law Review* 80, no. 8 (1967): 1641-78.
[24] Quoted in Barron, 1654.
[25] Quoted in Hocking, 172.

private media organization's actions (despite falling under First Amendment protection) which infringe upon the full and free public debate are subject to public regulation by virtue of the higher law of public rights to a free and full debate. But this case was decided on the basis of anti-trust law, not on explicit First Amendment grounds, and little was to come of it.

Scholars have subsequently wondered with astonishment how a precedent failed to be set in this case to protect the public interest from private appropriation.[26] The much cited Hutchins Commission Report (1947) on the press is replete with instances and warnings about the contradiction of preventing government from hindering the press even while endorsing the very same tyranny in the form of private media companies with a stranglehold on the marketplace. The Hutchins Commission reflected on new broadcast technology, market forces, and the nature of the modern press and came to ominous conclusions. Essentially, the public importance of the press was increasing as the mass media increased the range and depth of market penetration. Yet the nature of mass communication meant fewer speakers and vastly fewer operators of the major media due to the apparent necessity of economies of scale in these industries. Further, the vast majority of the speakers were engaged in commercial service, not public service, rendering the public interest a distant second as a priority in the for-profit press. Perhaps worse yet, the public did not seem aware or particularly concerned.[27]

In large part, this should not have been surprising, as the common knowledge about freedom of the press allowed for absolute freedom for media channels and the guaranteed provision of public service through the invisible hand of the marketplace. Without overturning, or at least troubling, these two pillars of First Amendment orthodoxy, no progress would be made. The Hutchins Commission came to precisely this conclusion—although their

[26] See for example, Hocking, 172 and Lee C. Bollinger, *Images of a Free Press*. Chicago: University of Chicago Press, 1991, 111.

recommendations fell far short of implementing their critique in any meaningful way. "Since the consumer is no longer free not to consume, and can get what he requires only through existing press organs," the Commissioners wrote, "protection of the freedom of the issuer is no longer sufficient to protect automatically either the consumer or the community. The general policy of laissez faire in this field must be reconsidered."[28]

Reconsidered in reference to what, we might ask. Deconstructing the marketplace model, and by implication its handmaiden—the libertarian interpretation of exclusively negative First Amendment rights—required laying out an alternative model of the public sphere and an alternative interpretation of the First Amendment. The latter has largely been covered in the earlier discussion of the analytical move toward affirmative, structural rights to public freedom of expression. This expansive definition of First Amendment rights has historical roots, legal theory, and political currency to back it up. The public sphere must be conceptualized with a similar breadth in order to match the entrenched orthodoxy of marketplace ideology.

Recent scholarship on the character of the press in Revolutionary America grants us a very important insight with regard to the public sphere and the freedom of expression. "Newspapers of the early republic operated under the master metaphor of the town meeting."[29] This argument is very helpful in the assessment of what early Americans perceived that the press ought to be. Recalling that the revolution and the nascent republican policies of the government greatly expanded the press system and its role in public life, we can expect that the institution experienced a kind of social redefinition as more people came into frequent contact with it. As might be expected, the society thought of the new in terms of the old, i.e. the burgeoning press was conceived in relation to a well-understood form of public political communication, public

[27] See Bollinger, 28-29; Hutchins, 1.
[28] Hutchins, 125.

meetings in the town hall. This formal definition was further informed by the Enlightenment political philosophy of the day which called for a very particular notion of the public sphere of political communication grounded in a common human pursuit of knowledge and truth.[30] It was to be a forum for deliberative democracy located between civil society and the state wherein all citizens (defined quite strictly in the 18th century) could contribute as anonymous equals (free of the biases and encumbrances of economic fortunes and social entanglements) to the crafting of public policy which aimed at producing the common good. The idea of a rational discourse among citizens who have discarded their personal interests to collectively pursue the common good pervaded the thinking of the Revolutionary generation—even if such an ideal could never actually manifest itself. Thus there is a strong, idealistic foundation for understanding the free press as the majoritarian, structural right to participate in this forum which draws on this burgeoning self-conception of the Founders. "Printers thought of their newspapers as the infrastructure to the public sphere and presented them as common carriers for the information and deliberations of a rational citizenry."[31]

Far from using the newspapers as "tools of commerce" to engage the political sphere, as the R&O suggests (¶353), the media system of the early Republic was explicitly non-commercial and explicitly public, political, and regulated by the state. Colonial newspapers were begun as quasi-governmental organs: they characterized themselves as "public prints" and often bore the phrase "Printed by Authority" on their mastheads. Their printer/editors were often postmasters, and a major source of income for colonial printers was printing the laws and other government

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[29] Barnhurst and Nerone, 49.
[30] Smith, 42.
[31] Barnhurst and Nerone 46-48, quotation on 48. The debates over this Habermasian understanding of the public sphere are not excluded because they lack merit, but only for purposes of clarity and the relatively shallow engagement with the concept that my particular analysis requires to make its point.

documents.[32] In the years leading up to the Revolution, and in the period that followed, newspapers and printers understood themselves as part of a movement and as having a special responsibility to represent the public. Both printers and political leaders viewed the press as the structure of the public sphere, as providing a neutral forum for public deliberation. They contrasted the "liberty of the press" with "licentiousness," by which they meant the pursuit of private political or commercial goals at the expense of the common good. They understood that licentiousness would undermine the republic.[33]

Indeed, the press of the early Republic was overwhelmingly political and explicitly driven by public resources and guidelines. Public policy, both official and unofficial, supported the press. Officially, local, state, and national governments all subsidized the press by paying for the printing of the laws and other public documents.[34] Later, one of the first official acts of the federal Congress was to pass postal legislation which included heavy subsidies for newspapers.[35] Meanwhile, unofficially, politicians subsidized printers to support their political positions and candidacies.[36] As a result of the integration of the press into the political and governmental system, the press in the US grew far faster than market forces would have allowed. The press in turn became an engine of growth for other sectors of the economy. Until the second half of the nineteenth century, the press understood itself as political more than commercial.[37]

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[32] Charles E. Clark, *The public prints : the newspaper in Anglo-American culture, 1665-1740*. New York: Oxford University Press, 1994.

[33] Stephen Botein, "Meer Mechanicks' and an Open Press: The Business and Political Strategies of Colonial Printers," *Perspectives in American History* IX (1975), 127-225; Stephen Botein, "Printers and the American Revolution," in Bernard Bailyn and John B. Hench, eds. *The Press & the American Revolution* (Worcester: American Antiquarian Society, 1980; Leonard Levy. *Emergence of a Free Press* (New York: Oxford University Press, 1985; John Nerone, *Violence against the Press: Policing the Public Sphere in US History* (New York: Oxford University Press, 1994.

[34] For more on this, see Culver Smith, *The press, politics, and patronage : the American government's use of newspapers, 1789-1875*. Athens: University of Georgia Press, 1977)

[35] Richard R. John. *Spreading the News*. Cambridge: Harvard University Press, 1995.

[36] Jeffrey L. Pasley. *"The tyranny of printers": newspaper politics in the early American republic.* Charlottesville: University Press of Virginia, 2001.

[37] Barnhurst and Nerone, *The Form of News: A History*. New York: Guilford Press, 2001, chapters 1-4.

Although printers had to master markets, and were canny entrepreneurs, they were simultaneously citizens and political leaders. Moreover, they understood commerce and politics to be in tension, and insisted on moral and ethical guidelines to prevent their commercial interests from overcoming the common good. Until the second half of the nineteenth century, the First Amendment guarantees of freedom of speech and press were understood to be limited by the concerns of the public good and the health of the public sphere. The framers of the constitution and the people who produced newspapers in the early republic understood "the press" to be "the printing press" and not an institution called the press. Until well into the nineteenth century, it was customary to use the press as a plural noun, shorthand for "gentlemen of the press," or more accurately the "men and women who used the press." The press did not come to be understood as a singular institution in a common commercial marketplace until the mid-nineteenth century.

Saul Cornell, in his study of the Constitutional debates, gives special emphasis to the relationships between the press and the public sphere. "Not only was the debate over the Constitution an important phase in the evolution of the public sphere in America, but the contest over it focused unprecedented attention on the politics of the public sphere itself."[38] The ideal of free and full public access to a rational debate over the common good—stripped so far as possible from the pursuit of private advantage—emerges in the writings of many of the early republic's best editorialists (who of course wrote anonymously in keeping with the spirit of the public sphere). Cornell notes that Philadelphia editorialist, "Centinel" (probably Samuel Bryan) "envisioned the public sphere of print as an important means of cementing the nation together. Print afforded a means of achieving social cohesion without a strong coercive authority."[39] Far

[38] Saul Cornell, *The Other Founders*. Chapel Hill: University of North Carolina Press, 1999, 21.
[39] Cornell, 104.

from an economic marketplace, the press in its finest form would embody its function as the basis for deliberative self-government. Of course, there were a handful of papers that published scandal and pitched their content at sales rather than service. These were a substantial minority with small influence. Jefferson blasted these papers, referring to them as "polluted vehicles."[40]

The "polluted vehicles" of the early republic have become the polluted system of modern times. Gone is even the pretense of the public sphere as the Founders envisioned it. Only the marketplace remains, and its governing forces are profit and private political advantage. The critique of the market as a mechanism to regulate public political communication is well traveled ground. We feel no need to explicitly detail it, as it is told very well elsewhere.[41] A few points of summary will suffice to connect the major arguments with the current discussion on alternative histories, theories, and political conceptions of the First Amendment.

Essentially, there is a damning fallacy in assuming that the marketplace of ideas is commensurate with the public sphere of deliberative democracy. The idea that a laissez-faire regulatory scheme that cedes all control of mass mediated public debate to commercial media concerns will somehow magically yield a representative sample of public ideas and interests is bankrupt. Perhaps one could equate the two in a town hall meeting in an 18th century Massachusetts farming community whose citizens had access to a dozen different mainstream newspapers of varying partisan stripes; but no longer. Not only does the current system invite corruption and the distortion of public representation for private gain, it absolutely ignores the imperative at the foundation of the First Amendment that the freedom of the press is the public

[40] Koch and Peden, 581. These lines are taken from a letter to John Norvell, June 11, 1807.
[41] See for example, C. Wright Mills, *The Power Elite,* New York: Oxford University Press, 1956; Jerome Barron, "Access to the Press--a New First Amendment Right." *Harvard Law Review* 80, no. 8 (1967): 1641-78; Edward Herman and Noam Chomsky. *Manufacturing Consent*. New York: Pantheon Books, 2002 [1988]; Robert W. McChesney, *Rich Media, Poor Democracy*. New York: New Press, 2000; Leonard Downie Jr. and Robert G. Kaiser. *The News About the News*. New York: Alfred A. Knopf, 2002; and Robert W. McChesneyand John Nichols. *Our Media, Not Theirs*. New York: Seven Stories, 2002.

right not only to contribute to the public debate, but to consume and consider a free and representative variety of public opinion. The market will naturally favor some voices over others, some topics over others, and transform citizens into political consumers. This process has proceeded blithely apace for so long in the face of decades of bitter criticism and critical research that the polity responds with apathy and cynicism to even the notion of a public sphere as it was envisioned by the Founders. In this context, we note that the very apathy of disillusion is now held up as proof of satisfied customers, or rather, citizens.

The critique follows two central tracks, one of which is really a function of the former, but which is often treated separately. The broadest arguments define the structure of a privately controlled, for-profit media system as fundamentally at odds with democratic goals. As media firms consolidate and concentrate thanks to federal deregulation based on libertarian, free market conceptions of First Amendment duties, the number of voices in the public sphere diminish. Diversity gives way to homogenization calculated for the economic and political benefit of minority interests at the expense of the majority. Market power is based on the idea of reducing competition, streamlining production, leveraging pre-existing advantages, and selling for the maximum price what may be produced for the minimum cost. The market is simply a poor mechanism for arbitrating public debates. Jerome Barron's savage explanation is a handy blueprint: "There is inequality in the power to communicate ideas just as there is inequality in economic bargaining power; to recognize the latter and deny the former is quixotic. The 'marketplace of ideas' view has rested on the assumption that protecting the right of expression is equivalent to providing for it."[42] The failure of that postulate to deliver is manifest in the continued de-politicization of modern society.

[42] Barron, 1647-8.

The second track of the critique addresses a product of this system and represents its most visible form: the content of the media system. At the most basic level, mainstream media has homogenized to an unprecedented extent. Standardized fare is cheaper to produce and more easily manipulated politically than a diverse marketplace. Moreover, even if a political motive is not immediately apparent, the drive to place profit before public service inevitably produces content that satisfies the minimum threshold of the lowest common denominator of public taste. Journalism lacks context, investigative depth, and international perspective. It is increasingly blended into a low-cost, infotainment form that privileges flashy graphics, celebrity news, and fluffy human interests stories over hard news or commentary on social issues. Those newspapers and broadcast stations that do produce quality work are almost always guilty of topically selective attention. Business, technology, and the intricacies of economic policy in Washington are covered with minute detail. These are the stories of greatest interest to the affluent, which happen to be the market most attractive to the advertisers who shell out the lion's share of media profits. Stories covering and analyzing the critical issues of America's disadvantaged classes (which make up the majority of the country) are strikingly rare.

Detailed work on the permutations of these arguments remains to be done in many cases but the broad outlines of the critique are clear and basically irrefutable. They have been made for a century, mirroring with dogged determination the rise of the commercial media system throughout the 20th century. It is indeed eerie that critiques of the commercial media system written in 1912, 1920, 1935, 1947, 1967, 1991, and 2003 could literally interchange their arguments sentence for sentence. The only difference is the problems have gotten worse and the warnings more urgent. Professor Barron concludes: "The Justices of the United States Supreme Court are not innocently unaware of these contemporary social realities, but they have

nevertheless failed to give the 'marketplace of ideas' theory of the first amendment the burial it merits." He speculates that it may be that the marketplace concept endures for lack of consensus on an adequate replacement. Yet the longer it lingers, the worse things get, and the greater the urgency and more difficult the task of reversing the course for future generations.[43]

Alexander Meiklejohn's critique of the marketplace of ideas is worth treating in full as it integrates the critique of the market with parallel critiques of the First Amendment assumptions the market requires and the damaging patterns of political communication it engenders. Beneath the structures and the anti-democratic economic realities of mega-media markets, there are other insidious forces at work. He begins by acknowledging that ideas are indeed tested in the deliberation of the public, and truth (such as it is perceived by people at any given moment) is pursued through this debate, resolution and compromise. "But that partial insight has often been interpreted…to be the total characterization of the truth-seeking process." This, he believes, is a matter of grave irresponsibility. For it leads to a circumstance in which individual citizens no longer seek to test their own ideas to ensure that they are indeed aimed at achieving the common good. On the contrary, each individual is content to advocate purely from his own private interest, feeling confident that the "market" will test the mettle of the idea and the truth will win out. We lose all touch with any notion of a collective body politic to which we are all responsible. And we adopt as truth those ideas which have won the fight in the marketplace. Naturally, the winners will not always or even often be the most favorable to the society in general, because private interests are in possession of different capacities to make their cases in the public sphere.

Volume, frequency, and persistence in the pursuit of a minority interest serve to undermine and collapse the agenda of finding the best course for the common welfare. "The

[43] Barron, 1647.

truth is what a man or an interest or a nation can get away with. That dependence upon intellectual laissez-faire, more than any other single factor, has destroyed the foundation of our national education, has robbed of their meaning such terms as 'reasonableness' and 'intelligence,' and 'devotion to the general welfare.' It has made intellectual freedom indistinguishable from intellectual license." It has also privileged the perception of what is true—what has earned the respect of the market through competitive domination by a particular set of interests—over what is best for the general public. "No one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community." The First Amendment is not meant to sanctify the marketplace of ideas, it is meant to ensure to every citizen "the fullest possible participation" in the working through of social problems. "When a free man is voting, it is not enough that the truth is known by someone else, by some scholar or administrator or legislator. The voters must have it, all of them. The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them." Any reading of the First Amendment that presupposes the marketplace of ideas works to undermine the public freedom of deliberation by replacing it with the private freedom to pursue the knowledge that will gain minority advantage. This negates the most important purpose of free speech, to ensure by "our common agreement that, working together as a body politic, we will be our own rulers."[44]

It is consent and consensus through informed debate not competition and submission through Darwinian dogfights which is sought by the public spirited intent of the Constitution and

[44] Meiklejohn, *Political Freedom*, 73-75.

the affirmative freedom of expression provided for the American public. The social contract is not an invitation to a Machiavellian power struggle but a commitment to the common good. As Jerome Barron puts it: "As a constitutional theory for the communication of ideas, laissez faire is manifestly irrelevant."[45] The era when the First Amendment could be seen primarily as a defender of personal liberties in a public sphere all but guaranteed to be free and open if its participants were unfettered is long gone (if it ever existed). The only way to claim the public right to a deliberative discussion about common affairs with guaranteed access and voice for all citizens is to wrest the control over the media system from the private interests which run it. The only way to reinstall an affirmative right to the structural integrity of public communications systems is to expose the marketplace as an inadequate method of producing fair treatment for all. In a marketplace, individual rights (property rights) have precedence over public rights (assets commonly held). In a public sphere, the reverse is true. Though the manifestations of this debate are complex, the basic questions are very simple. To which victor go the spoils of public policy? The private interest or the common good?

We set out to describe and critique the status quo of libertarian First Amendment thinking which lies at the base of this R&O and to offer an alternative set of possibilities. The overarching conclusion is that this paradigm does exist, is easily within reach, and requires only the will of public consideration to find purchase in a regulatory regime. It is neither esoteric nor impractical, but draws from relatively common sense approaches to historical memory, legal traditions, and public policy.

We must appreciate that the First Amendment was almost certainly intended as a majoritarian right provided for by the protection of individual speech. The public interest was always the primary concern. The Founders understanding and discussion of these legal rights are

[45] Barron, 1656.

sometimes easy to misread, not because their reasoning is unclear, but because the historical situation in which it was applied is so different from our own. Proceeding with the intent of untangling the specificities of historical moments, we begin to see that the balance of public and private interests in the First Amendment corresponds to a balance of negative and affirmative liberties. The prohibition on government power to abridge speech does not prohibit, and in fact obliges, a complementary policy of support and enhancement of the public sphere. From this position, we may then see the inadequacy of the marketplace to achieve the ideals the Founders intended and which we aspire to sustain. On the contrary, the marketplace of ideas, when taken to its modern context of monopoly capitalism, produces a scenario which tends toward the exact opposite of the public rights the Founders intended and democratic society demands. The First Amendment theory that has attempted to justify this change in the marketplace has convoluted and reversed our constitutional priorities. Instead of extending the public right to a free and full public sphere to logically incorporate the individual's right to free speech, we have extended the individual's right to the institutional level and prohibited any public involvement in the administration of its own system of communication. This distortion must be reversed and the priorities of constitutional law restored. There is no power in the law that grants private interests total authority over the foundational basis of self-government—public discourse. Finally, we must actively implement these historical and theoretical insights into our current regulatory regime and the political culture it fosters.

There is no justice to be gained from eliding the necessity of representative variety in our media system. There is nothing but ideology and economic rationalism behind the relegation of diversity to assurances that the market will undo homogenization. There is no sense in pretending that variety at the margins of the media system counteracts homogeneity at the core.

We must recognize that any media system premised on an economic model that privileges private economic gain over the rights of free and full public communication is bankrupt. We must endorse affirmative First Amendment rights, reject the market model of political communication, redefine freedom of the press in the public interest, and empower regulatory government agencies to implement criteria to ensure that the public is offered a representative variety in its cultural and political fare. Though we may risk losing public accountability in the media system by transferring power to the state, we guarantee it by leaving it in the marketplace.

Respectfully submitted,

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